IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 801 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NEW INDIA ASSURANCE CO LTD

Versus

VIRAMBHAI PUNJABHAI PARMAR

Appearance:

MR RAJNI H MEHTA for Petitioner

MR YOGESH S LAKHANI for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 06/12/1999

CAV JUDGEMENT

The appellant-New India Assurance Company Ltd. has filed this appeal under Section 110-D of the Motor Vehicles Act, 1939, challenging the judgment and award of the Motor Accident Tribunal (Special) at Porbandar in Claim case No.48/88.

2. On February 16, 1988 deceased Malde had taken his public carrier beiig No.GTW 4173 to Village Ranavav. The moment he reached his destination the rear axil of his vehicle was not working properly and, therefore, he decided to get it repaired at village Ranavav. He got the vehicle repaired at Ranavav and for returning back he caught public carrier bearing No.GTW 3936, and paid Rs.10/- to the driver of the said public carrier as fare charges. The public carrier, after going at a distance of 5 kms. from Ranavav turned turtle as the driver had applied sudden brakes. The said public carrier was driven by the driver in a very rashly and negligent manner and at high speed. As a result of the public carrier turning turtle, the deceased received serious injuries and ultimately succumbed to death.

3. The claimants No.1 and 2 are the parents of the deceased Malde whereas claimant No.3 is the real brother and claimant No.4 is the unmarried sister of the deceased. They filed claim case under section 110-D of the Motor Vehicles Act, 1939 (for short, 'the Act') claiming compensation of Rupees One lakh for the accidental death suffered by the deceased Malde in the vehicular accident.

4. The driver and the owner of the offending vehicle filed their replies at Exh.13. The Insurance Company filed its reply at Exh.15. In the reply it was contended that the driver of the public carrier was not negligent in driving the vehicle and the deceased was travelling illegally in the public carrier as in the public carrier, no passenger was permitted to travel. The Insurance Company also contended that the amount claimed by the claimants was highly exaggerated and the claim application be dismissed.

5. Before the Tribunal, father of the deceased, Virambhai Punjabhai was examined at Exh.23. During his deposition, he produced copy of the F.I.R., post-mortem report and panchnama of the place of the accident. No witness was examined on behalf of the opponent. The tribunal, after appreciating the oral asa well as documentary evidence, came to the conclusion that the offending vehicle was driven in rash and negligent manner by the driver and the accident had taken place due to his negligence. The Tribunal, after appreciatiang the oral and documentary evidence with regard to income of the deceased, awarded compensation of Rs.66,000/- to the claimants for the untimely death of the deceased Malde which took place in the vehicular accident, to be recovered from the appellant as well as respondents nos.

5 and 6 jointly and severally with interest and proportionate costs, which has given rise of filing of this appeal by the Insurance Company.

6. The appellant-Insurance Company in this appeal has not challenged the quantum of compensation, but has only challenged its liability to indemnify the insured as claimant, deceased Malde was a passenger in a goods vehicle in breach of the terms of the policy and the permit. Learned Advocate for the appellant has vehemently urged that the policy of the vehicle which was produced before the tribunal at Exh.22 did not cover risk of passengers who were carried in the goods vehicle by charging fare. It is urged that admittedly, deceased Malde had paid Rs.10/- to the driver of the vehicle and had travelled as fare paying passenger in the goods carier. It is, therefore, urged by the learned Advocate for the appellant that the tribunal seriously erred in passing award against the Insurance Company because the policy did not cover risk of passengers who were carried in the vehicle by paying fare.

7. Learned Advocate for the respondent-original claimants vehemently submitted that there was no evidence on the record that the owner and the driver were often carrying passengers illegally and they were habituated in carrying passengers on a regular basis in the goods vehicle. It is urged that in absence of positive evidence with regard to the continuous carrying of passengers illegally by charging fare by the driver of the offending vehicle it cannot be said that the passengers were being carried in goods vehicle by charging fare regularly.

8. The contention of the learned Advocate for the appellant that the offending vehicle which was a goods vehicle, was not permitted to carry passengers for hire or reward, deserves to be accepted in view of the pronouncement of the Apex Court in the case of Smt.Mallawwa etc. v. Oriential Insurance Co., reported in JT 1998 (8) SC 217.

9. In the case of Smt.Mallawwa (supra), the Apex Court was dealing with the question that whether the Insurance Company was liable to indemnify the insured in case death of a fare paying passenger who was carried in goods vehicle. In the group of appeals before the Apex Court, the deceased were travelling in goods vehicle as fare-paying passengers who had succumbed to injuries, prior to introduction of Motor Vehicles Act, 1988. Therefore, the facts of the present case are similar to

the facts of the cases before the Supreme Court. It may be mentioned that in this appeal as the accident had taken place on February 16, 1988, Motor Vehicles Act, 1939 shall be applicable. The Supreme Court, after considering the provisions of Section 95 of the Act, concluded that the owner of a goods vehicle cannot claim indemnification from the insurer in case the goods vehicle had carried a passenger by taking fare. It was further ruled that this would perhaps robe the third proviso dealing with the contractual liability lame. In view of the pronouncement of the Supreme Court in the case of Smt. Mallawwa etc.(supra), a passenger who, by paying fare is carried in a goods vehicle will not be covered under the policy issued under section 95 of the Act. Therefore, the appellant-Insurance Company shall have to be exonerated from the payment of compensation awarded by the tribunal.

10. Learned Advocate for the original claimants vehemently submitted that there was no evidence produced before the tribunal to show that there was a systematic carrying of passengers in goods vehicle. It is submitted that only if the vehicle is so used often, then that vehicle can be said to be a vehicle in which passengers are carried for hire. If the submission of the learned Advocate for the original claimants is accepted, then the whole object of the Act and particularly section 95 would be frustrated. No doubt, the Act is a beneficial legislation and one would normally prefer a liberal interpretation, but the question which arises is whether without paying extra premium, the owner of the vehicle can claim indemnification from the insurer after taking fare from passengers, in clear breach of terms of the policy ? If the argument of the learned Advocate for the original claimants is accepted then hardly there would be any evidence before the tribunal that the vehicle was systematically and habitually used for carrying passengers for hire. That would lead to a disastrous situation. The Supreme Court in Smt. Mallawwa's case (supra) observed as under:

> "Thus, to find out whether an insurer would be liable to indemnify an owner of a goods vehicle in a cse of the present nature, the mere fact that the passenger was carried for hire or reward would not be enough, it shall have to be found out as to whether he was the owner of the goods, or an employee or such an owner, and then whether there were more than six persons in all in the goods vehicle and whether the goods vehicle was being habitually used to carry passengers. The

position would thus become very uncertain and would vary from case to case. Production of such result would not be conducive to the advancement or the object sought to be achieved by requiring a compulsory insurance policy."

11. The Apex Court in the above case, with approval has accepted the observation of the decision of the Orissa High Court in the case of New India Assurance Company v. Kanchan Bewa & Ors., (1994 ACJ 138) that "there is another aspect of the matter which has led us to differ from the Full Bench decision of Rajasthan High Court. The same is what finds place in sub-section (2) of Section 95. That sub-section specifies the limits of liability and clause (a) deals with goods vehicle; and in so far as the person travelling in goods vehicle is concerned, it has confined the liability to the employees only. This is an indicator, and almost a sure indicator, of the fact that legislature did not have in mind carrying of either the hirer of the vehicle or his employees in the goods vehicle, otherwise, clause (a) would have provided a limit of liability regarding such persons also."

12. After quoting the above observation of the Full Bench of Orissa High Court, the Apex Court held that "though a conclusion was arraived at after taking into consideration the Orissa Motor Vehicle Rules, in our opinion the said view is correct, even otherwise also, in view of what we have said, the contrary view expressed by other High Courts has to be regarded as incorrect."

13. Thus, the legal position is clear that legislature did not permit carrying of passengers in the goods vehicle even by paying extra fare, otherwise, clause (a) of section 95(2) would have provided a limit of liability regarding such persons also. In the present appeal, the claimant was carried in a goods vehicle by charging fare which was not covered under the coverage of the insurance policy. Therefore, the Insurance Company cannot be held liable to indemnify the insured with regard to amount of damages awarded to the claimants.

14. As a result of the foregoing discussion, this appeal requires to be allowed. The judgment and award of the tribunal directing the original opponents No.1, 2, and 3 to pay Rs.66,000/- jointly and severally with interest at the rate of 12% per annum from the date of application till realization is set aside and the appellant-original opponent No.3 is exonerated from the liability to pay compensation to the original claimants.

15. The learned Advocate for the respondents No.1 to 4 (original claimants), has vehemently argued that the compensation awarded by the tribunal is not adequate and requires to be enhanced. In my view, the submission of the learned Advocate for the respondent is devoid of merit and deserves to be rejected, precisely on the ground that the original claimants have not challenged the impugned order by filing cross objections or appeal claiming enhanced compensation. Even if the submission of the learned counsel for the original claimants for enhancement of compensation is entertained, in my opinion, the tribunal, in absence of evidence with regard to the income of the deceased, assessed the annual income at Rs.450/- per month because it was not proved that the deceased was regularly employed driver. The tribunal concluded that the deceased was a casual employee (driver), and therefore, the income of the deceased was assessed at Rs.450/- per month. The tribunal assessed Rs.300/- per month as dependency benefits to the claimants and had applied multiplier of 15 which, in the facts of the case, was just and proper. Thus, the tribunal awarded an amount of Rs.54,000/- to the claimants towards loss of dependency benefit because of the untimely death of the deceased, which in my view is just and adequate compensation to be awarded to the original claimants and, therefore, it does not call for any interference of this court. Therefore, the quantum of compensation awarded to the claimants is not disturbed and is confirmed.

16. As a result of the above discussion, the award passed against the appellant is set aside and it is held that the appellant shall not be liable to pay compensation awarded to the respondents Nos. 1 to 4. In view of the above reasoning, the impugned award of the tribunal is modified to the extent that the original opponents Nos. 1 and 2 i.e. respondents Nos. 5 and 6 of this appeal shall pay jointly and severally to the original claimants-respondents No.1 to 4 the amount of compensation of Rs.66,000/- (Rupees Sixty six thousand only) with 12% interest from the date of application till realization with proportionate costs of the petition. The direction of the tribunal with regard to investment and disbursement of the amount of compensation are not disturbed and are hereby confirmed. The award be modified accordingly.

The appeal is therefore, allowed to the extent indicated above. There shall be no order as to costs. The office is directed to draw decree in terms of this judgment.

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msp.